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Decision 02-09-025 September 5, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

County Sanitation District No. 2 of Los Angeles County, Complainant, v. Southern California Edison Company, Defendant.	Case 99-10-037 (Filed October 27, 1999)

ORDER GRANTING REHEARING OF DECISION (D.) 02-04-051

I. INTRODUCTION

Complainant County Sanitation District No. 2 ("District") is an operator of a generating plant known as the "Spadra Project" that burns methane gas that is produced at its landfill in Pomona, California. In June, 1986, the District and Southern California Edison Company ("Edison") entered into a Power Purchase Contract ("Purchase Contract") whereby the District agreed to sell and Edison agreed to purchase electricity produced by the Spadra Project. To deliver the electricity to Edison, the District paid for the design, construction and maintenance of a substation.

In December, 1988, the District and Edison entered into an Interconnection Facilities Agreement ("Facilities Agreement") regarding the construction of the substation. The Facilities Agreement called for placement of a 12 kilovolt (kV) revenue meter on the District side of the substation. Since the Spadra Project began operation in 1991, Edison has paid the District at an amount consistent with a 66 kV interconnection.

The District also entered into an Electric Service Contract in December 1989, for the purchase of standby electricity from Edison when the District's facility was not generating electricity. This Contract provides that service to the District's Spadra Project would be provided under Schedule TOU-8 and would be at a service voltage of 12 kV. Taken together, the Facilities Agreement and the Electric Service Contract resulted in the District paying a higher price for electricity purchased from Edison [the 12kV rate] than Edison paid to the District for energy generated by the Spadra Project [the 66kV rate].[1]

Compensated metering was not available at the time the District selected 12 kV metering for the electricity it purchased from Edison. Compensated metering allows for an adjustment for transformer losses so that a customer pays for electricity at 66 kV level, which is less expensive than electricity measured at 12 kV level. Compensated metering became available in May 1990 under Special Condition No. 16 of Schedule TOU-8. Under compensated metering, the disparity between the District's sales at the 66 kV rate and purchases at the 12 kV rate would have been mitigated. When the District learned of the availability of compensated metering in January 1999, it requested installation of a compensated metering device, incurred a one-time cost of under $3,000, and began saving approximately $6,000 per month in electricity purchased from Edison for standby service.

On October 27, 1999, the District filed a complaint against Edison at the Commission for alleged billing overcharges and tariff violations. The complaint requested relief in the form of a refund in the amount the District alleges it was overcharged due to Edison's violations. On December 9, 1999, Edison filed an answer to the complaint, admitting that the issues are whether Edison overcharged the district for electric services and violated the tariffs and raising numerous affirmative defenses.

[1] In contrast to the Spadra facility, at the District's Palo Verde facility, electricity purchased from Edison is connected at 12 kV but is billed at the lower 66 kV rate.

A prehearing conference was held in this matter on April 24, 2000. At the hearing, counsel for Edison suggested the possibility of resolving the District's complaint via motions for summary judgment. The parties and the Administrative Law Judge ("ALJ") thereafter agreed on a briefing schedule for cross-motions for summary judgment. A hearing on the parties' cross-motions for summary judgment was held on July 25, 2000.

On September 22, 2000, the ALJ issued a Draft Decision ("DD") granting Edison's motion for summary judgment as to all five causes of action in the District's complaint. The District filed comments to the DD, alleging that it never received notice, as required by Rule 12, of the new or revised rate available under Special Condition 16.[2]

The District claimed in its comments to the DD that it never received Advice Letter 864 ("AL-864"), which was sent by Edison to its customers in May 1990 to inform them about the availability of compensated metering. In support of this allegation, the District submitted Edison's own service list for AL-864 – a list that did not include an entry for the District, or indicate that the AL had been sent to any District address. Accordingly, we found that a material issue remained; namely, whether Edison served AL-864 on District, or used other reasonable means to inform the District of the availability of compensated metering. Because a material issue remained unresolved, D.01-02-071 denied Edison's motion for summary judgment as to the District's third cause of action and ordered supplemental briefing and testimony as to this issue.[3]

Following the submission of additional briefing and testimony, a DD on the Rule 12 issue was mailed to the parties in accordance with Public Utilities

[2] Rule 12 required Edison to inform its customers when a new or revised pricing option becomes available. Edison received authorization to offer compensated metering for certain customers in April, 1990. Because such metering could result in service at a "more favorable" rate, Edison notified its customers in May, 1990 of this new option by way of Advice Letter 864.

[3] The District filed an application for rehearing of D.01-02-071 on March 26, 2001. On August 2, 2001, the Commission issued D.01-08-025 and denied rehearing because no legal error had been demonstrated.

Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on March 1, 2002, and reply comments were filed on March 6, 2002.

On April 22, 2002, we issued D.02-04-051 ("the Decision"), resolving the third cause of action in favor of the District. However, the Decision found that, pursuant to the three-year statute of limitations in Public Utilities Code § 736 and Edison's Tariff Rule 17, the District's recovery of reparations was limited to the time-frame from January 7, 1996 to January 7, 1999. Thus, the Decision ordered Edison to review its billing records from January 7, 1996 to January 7, 1999, and to refund to the District the difference between the rate District actually paid and the amount it would have paid if the compensated metering device were in place.

Edison filed a timely application for rehearing of D.02-04-051 on May 24, 2002, and the District filed a response to the application for rehearing on June 3, 2002.

We now grant rehearing in order to provide the parties with an opportunity for an evidentiary hearing regarding the third cause of action of the District's complaint.

II. DISCUSSION

In its rehearing application, Edison challenges D.02-04-051 on the following grounds: (1) the Decision errs in denying Edison's motion for summary judgment and granting summary judgment in favor of the District on the third cause of action; (2) the Decision errs because Edison did not violate Rule 12 based on the plain language of Rule 12; and (3) the Decision errs because the District's claim is barred by the doctrine of laches.

A. Summary Judgment.

In its rehearing application, Edison asserts that the Decision errs in denying Edison's motion for summary judgment and granting summary judgment

for the District on the third cause of action, and that the weight of the evidence presented justifies a ruling in favor of Edison and against the District on the third cause of action. Edison also claims that the Commission erred in not permitting further discovery and in not granting an evidentiary hearing as to the third cause of action of the District's complaint.

As noted above, a hearing was held on the parties' cross-motions for summary judgment on July 25, 2000, and the initial DD granted Edison's motion for summary judgment as to all five causes of action of the District's complaint. However, it was only in its comments to the DD that the District for the first time submitted the service list for AL-864 as evidence that it was never properly notified of the availability of compensated metering. We viewed this evidence as sufficiently compelling to justify denying Edison's motion for summary judgment as to the third cause of action and to order further briefing on this issue. (See D.01-02-071.) In response to this new evidence, Edison requested further discovery and an evidentiary hearing. (See Southern California Edison Company's (U 338-E) Comments on the Opinion Granting Complainant's Motion for Summary Judgment as to the Third Cause of Action, March 1, 2002, p. 2.) No further hearings were held, and we issued D.02-04-051, resolving the third cause of action in favor of the District.

In its Response to Edison's Application for Rehearing, the District suggests that Edison waived its right to a full hearing on the merits. At the hearing on July 25, 2000, when asked by the ALJ whether a further hearing would be necessary, counsel for Edison responded: "I believe there's enough in the record on the summary judgment motions to rule in SCE's favor. But if your Honor feels that there needs to be more information, then I probably would bring my account manager and have him elaborate on what his duties are, his dealings with the District, or at least submit direct testimony on the scheduled date for that [the hearing]." (Record Transcript, July 25, 2000, p. 38, lines 22-28.)

While this representation by Edison's counsel may appear to be a waiver of Edison's right to a full hearing on the merits, case law provides that "waiver is the intentional relinquishment or abandonment of a known right." (See, e.g., Cowan v. Superior Court (1996) 14 Cal.4th 367, 371; People v. Saunders (1993) 5 Cal.4th 580, 590 fn. 6.) Nowhere in the record does Edison expressly state that it is relinquishing or abandoning its right to a full hearing on the merits. Rather, counsel for Edison stated that there was sufficient evidence to rule in Edison's favor on its motion for summary judgment, but if the ALJ did not grant Edison's motion for summary judgment, then Edison planned to present direct testimony at a hearing on the merits. We cannot say that this amounts to a waiver of Edison's right to a hearing.[4]

Code of Civil Procedure Section 437c governs motions for summary judgment and "imposes evidentiary burdens and procedural requirements for parties who seek to pierce the pleadings and terminate an action without trial." (Mediterranean Construction Co. v. State Farm Fire & Casualty Co. (1998) 66 Cal.App.4th 257, 262.)[5] Section 437c includes repeated references to a "hearing," including a 33-day notice requirement for the "time appointed for hearing" and a 30-day statutory cutoff for when a motion must be "heard" before the date set for trial. (Code of Civil Procedure Section 437c, subd. (a).) These requirements reflect an "expectation that basic due process will be followed in summary judgment proceedings, i.e., fair notice and opportunity to be heard." (Mediterannean Construction, supra, at 264; see also Gwartz v. Superior Court (1999) 71 Cal.App.4th 480, 482 (while the court, after a hearing, may again deny summary judgment, the possible correctness of the court's ruling is not a proper basis on which to deny a hearing).)

[4] Counsel for Edison should be aware that we disapprove of this tactic whereby a party states that "no further hearing is needed if we win, but if you might rule for the opposing party we want a hearing." We encourage parties to express their need for a hearing in a more specific and less ambivalent manner, so as to avoid unnecessary delays and waste of Commission resources.

[5] Although Section 437c technically applies to superior courts and not to Commission proceedings, the same principles would apply to summary judgment at the Commission.

It is certainly true that Edison has been provided an opportunity to present documentary evidence and legal arguments to the Commission throughout this proceeding. However, given the fact that the District submitted the service list for AL-864 late in this proceeding, after hearings had already been concluded and a DD issued, it is reasonable to afford Edison an opportunity to conduct necessary discovery and to present newly discovered evidence at a hearing.

It may well be that, after an additional opportunity to present evidence and to be heard, the District may still prevail as to the third cause of action. However, as noted above, Edison should be provided with a full and fair opportunity to conduct discovery and present evidence to the Commission on this issue.

B. Rule 12.

Edison next contends that Rule 12 is not applicable to the District's third cause of action because compensated metering is an "optional provision," and Edison is not obligated to notify existing customers about "optional provisions." In support of this allegation, Edison claims that the District's third cause of action is brought pursuant to Rule 12C, which refers to "New or Revised Rates," and not Rule 12B, which addresses "Optional Rates." Edison's contention is that, under Rule 12B, it is obligated to notify new customers of the various optional rates and provisions available, but that under Rule 12C, it has no obligation to notify existing customers about "optional provisions" such as compensated metering. Nothing in Rule 12B or 12C specifically defines what "optional provision" means or specifies whether compensated metering is considered an "optional provision."

The problem with Edison's interpretation of Rules 12B and 12C is that compensated metering was, in fact, a "new or revised rate" that only became available in May, 1990, after Edison and the District had entered into various contracts and agreements. It is undisputed that compensated metering was not available at the time the District selected 12 kV metering for the electricity it

purchased from Edison. Thus, compensated metering was certainly a "new or revised rate" as far as the District was concerned, since it was not an available option at the time the contracts were entered into.

As noted in Shimek v. Pacific Gas & Electric Company (1993) 51 CPUC2d 513, the purpose underlying Rule 12 is to "get the word out" to affected customers regarding cost-effective alternatives to their current service. The fact that the District could not have chosen compensated metering at the time it entered into its contracts with Edison, coupled with the policy concerns underlying Rule 12's notification requirement, amply justify our determination that Edison was required to notify the District of the availability of compensated metering pursuant to Rule 12C. As such, no legal error has been demonstrated as to our application of Rule 12.

C. Doctrine of Laches.

Edison's final allegation of legal error is that the Commission erred in not applying the doctrine of laches to the District's claims. The doctrine of laches provides that "[t]he law helps the vigilant, before those who sleep on their rights." (Civil Code Section 3527.) Laches is unreasonable delay in asserting a right which renders the granting of relief inequitable. (See Adams v. Young (1967) 255 Cal.App.2d 145, 160; see also Butler v. Holman (1956) 146 Cal.App.2d 22, 28.) To apply the doctrine of laches to a party seeking relief, it must be demonstrated that such party had actual knowledge of facts or failed to acquire such knowledge after receiving notice. (See McNulty v. Lloyd (1957) 149 Cal.App.2d 7, 10-11.)

In addition, the question of laches is to be determined in each case on the basis of the facts presented, and, in the absence of a clear abuse of discretion, a trial court's finding as to laches will not be disturbed on appeal. (Millbrae Association for Residential Survival v. Millbrae (1968) 262 Cal.App.2d 222, 247; see also Marshall v. Marshall (1965) 232 Cal.App.2d 232, 251-52 (question of laches is for trial court's determination in light of facts and circumstances of particular case; its conclusion will not be set aside by appellate court if substantial

evidence supports it); Glass v. Gulf Oil Corp. (1970) 12 Cal.App.3d 412, 433 (laches is to be determined primarily and largely by the trial court; an appellate court will not interfere with the trial court's discretion unless manifest injustice has been done, or unless its conclusion cannot reasonably be held to find support in the evidence).)

Edison has failed to establish that the doctrine of laches should be applied to the District's claims for two reasons. First, laches applies only where there has been unreasonable delay by the party seeking relief. In the present case, based upon the evidence presented to date, Edison did not demonstrate that the District unreasonably delayed in seeking redress for its billing grievances. Second, laches requires that the party seeking relief have actual knowledge of facts or fail to acquire such knowledge after receiving notice. As discussed above, based upon the evidence presented to date, Edison was unable to conclusively establish that the District had notice of the availability of compensated metering prior to January, 1999. While it is possible that further discovery and hearings may shed additional light on these issues, on the record presently before us it cannot be said that the District unreasonably delayed in seeking relief or had actual knowledge of the availability of compensated metering prior to 1999. Thus, Edison has not demonstrated legal error as to the application of the doctrine of laches.

III. CONCLUSION

Rehearing should be granted in order to provide the parties with an opportunity for an evidentiary hearing regarding the third cause of action of the District's complaint.

IT IS THEREFORE ORDERED THAT:

1. Rehearing of D.02-04-051 is granted in order to provide the parties with an opportunity for an evidentiary hearing regarding the third cause of action of the District's complaint.

2. Rehearing of D.02-04-051 is otherwise denied.

This order is effective today.

Dated September 5, 2002, at San Francisco, California.

LORETTA M. LYNCH
President
CARL W. WOOD
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners

Commissioner Henry M. Duque, being necessarily absent, did not participate.